MONTANA

Management View

An electronic newsletter for the state government manager from the Labor Relations Bureau

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Unions propose annual budget increases of 6 percent for pay raises in FY 2004-05

The two largest state employee unions propose 6-percent annual increases in budgeted personal services to fund pay raises in each year of the upcoming biennium. The proposal came in the second bargaining session between the state, MPEA (Montana Public Employees Association) and MEA-MFT. The Labor Relations Bureau estimates the proposal would cost the general fund roughly $51 million, with a total cost to all funds of roughly $122 million. Union negotiators presented the proposal as a "budgetary increase" – not an across-the-board pay increase – signaling a possible interest in distributing pay raises differently than in the past two biennial periods (FY 02-03 and FY 00-01).

MPEA and MEA-MFT also advanced proposals to: change the five-year longevity payment to four years; increase each longevity increment to 2 percent; and continue payment of the full health insurance premium for employee-only coverage.

SPD managers brief Governor Martz

Wages are relatively low. Turnover is relatively high. The cost of health insurance is climbing fast. These issues were prominent when State Personnel Division managers met March 6 with Governor Martz to brief her on issues relevant to state employment and collective bargaining.

Highlights

Administrator John McEwen referred to the May 2000 salary survey that showed state government employees earned an average of 16 percent less than their in-state counterparts. McEwen reported the state seems be "holding that ground." National salary increases are trending at 4.5 percent per year. State government continues to experience pay-related recruitment problems with most professional jobs, he said, while some state agencies have reported improved recruitment and retention ability for jobs in the lower pay grades. *(More current salary comparisons will be available in May when the SPD publishes its biennial salary survey.)*

McEwen also reported a growing turnover rate of 12 percent throughout state government, rising from 10 percent in FY 2000. He projected the rate would rise again in the next biennium when 20 percent of state government's workforce will be eligible for retirement.

The most challenging employment problem facing state government, however, could be the escalating cost of the state's health insurance package. Cost increases are averaging 10 percent per year. McEwen estimated a premium increase of $36 per month would be needed to maintain existing benefits. A $10-increase in the state's monthly premium contribution per employee would cost the general fund $1.8 million, for a total cost to all funds of $4.2 million.

The state and the two unions will continue to meet this spring. The state anticipates being able to advance economic proposals this summer, when the FY 2004-05 revenue picture becomes clearer and more information is available on benefit plan increases.

First LMTI conference receives high marks

Customized labor-management committee training available

People who attended the first Labor-Management Training Initiative (LMTI) conference March 26-27 gave it a good review and expressed desire for follow-up training. The conference was at Chico Hot Springs. About 60 front-line employees and managers attended from 12 state agencies and 16 bargaining units, plus agency personnel representatives and union staff. Participants spent the first day exploring interest-based problem-solving concepts under the tutelage of Wendy Greenwald and Bob Nightengale from the Oregon Employment Relations Board. The second-day focus was building and maintaining effective labor-management committees, guided by Andy Hall from the Federal Mediation and Conciliation Service. Evaluations suggested customized follow-up training for smaller labor-management committees at the agency level.

The Labor Relations Bureau, in collaboration with MPEA and MEA-MFT, will coordinate individualized interest-based training efforts for state labor-management committees upon request. If you're interested in securing training, contact your agency personnel officer or Stacy Cummings at **www.stcummings.state.mt.us**.

Employees charged with crimes

It's a minefield for managers, particularly when charges stem from off-duty conduct

Most state managers will go through their careers without once confronting a situation involving criminal charges against one of their employees, on or off duty. But the fact remains that, while certain work environments are more susceptible to these occurrences, none of us are immune from them. We've all read news accounts of trusted finance officers charged with embezzling, of law enforcement workers involved in off-duty brawling, or of professional caregivers exploiting patients. The following articles and arbitration reports are intended to provide some insight and general guidelines for managers.

First-response steps

1. **Contact your human resource officer and legal counsel.** Your human resource officer and legal counsel can help you navigate through the myriad of legal, constitutional and disciplinary due process concerns that come into play.

2. **Conduct an independent investigation.** There's risk in relying solely on law enforcement investigations or tying disciplinary decisions to the outcome of criminal proceedings. While managers need to be cautious of public employees' constitutional rights during criminal investigations (see next article addressing *Garrity* rights), remember that criminal prosecution and public employee discipline are not synonymous. Any decision regarding employee discipline must be focused on the employment relationship, separate and distinct from any decision or action by law enforcement or criminal prosecutors. Moreover, there's a good chance the prosecutor may decide not to charge, may drop a charge for workload reasons, or may plea bargain.

3. **Determine the nexus of off-duty incidents.** As a general rule, labor arbitrators are reluctant to sustain discipline for off-duty activities unless the employer can establish a rational connection between the off-duty conduct and the employee's job. When employees are jailed for their crimes, for example, case studies show that employers fare better in arbitration if discharge is based on their unavailability for work rather than the jail sentence or the specific crime warranting the jail term.

Read on for specific guidance from two experts at the Department of Justice concerning *Garrity* rights and access to and the availability of criminal background information:

"Garrity" rights

Understanding public employees' rights against self incrimination

By Kim Kradolfer, Assistant Attorney General

This article addresses handling issues within the context of the privilege against self incrimination. When law enforcement is involved, other constitutional issues may arise. Be sure to involve your human resource, legal, or labor relations staff in any investigation that involves these issues.

You're the manager. One of your employees has done something that is or may arguably be criminal. How do you proceed?

The United States Supreme Court has issued three holdings in tension with each other that must be considered:

- ⇨ First, if a public employee is coerced into providing incriminating evidence under threat of facing a disciplinary penalty for refusing to answer, the information obtained may not be used against him in any criminal proceedings. Garrity v. State of New Jersey, 385 U.S. 493 (1967)

- ⇨ Second, a public employer can require an employee to answer questions specifically, directly and narrowly relating to their official duties on pain of dismissal for refusal to do so ***if*** the employee is not required to relinquish his right against self-incrimination. Gardner v. Broderick, 392 U.S. 273 (1968)

- ⇨ Third, public employees subject themselves to dismissal if, after proper proceedings which do not involve an attempt to coerce them into relinquishing their right against self-incrimination, they refuse to account for their performance of their public trust. However, if the employer is seeking information that is "not merely an accounting of their use or abuse of their public trust, but testimony from their own lips which, despite the constitutional prohibition [against self-incrimination] could be used to prosecute them criminally," the employees are ***not*** required to answer and may not be disciplined for that refusal. Uniformed Sanitation Men Assoc., Inc. v. Comm'r of Sanitation of the City of New York, 392 U.S. 280 (1968)

In short, (1) an employee cannot be disciplined for refusing to waive the constitutional right against self-incrimination; and (2) if an employee is coerced into making a statement under

…***an employee cannot be disciplined for refusing to waive the constitutional right against self-incrimination…***

threat of disciplinary action if he refuses, the statement cannot be used against him in any criminal proceedings.

If you question an employee you suspect of criminal activity, you should first do the following:

1. Contact the law enforcement agency that is investigating or would have jurisdiction to investigate the suspected criminal conduct.

2. Work with the law enforcement agency to determine if the agency intends to question the employee. The criminal investigator may want to do so if other evidence is not sufficient to obtain a conviction. Therefore, let the criminal justice agency have the first crack at interviewing the individual.

3. If the investigator does *not* want to interview the individual, you can do one of two things:

   Contact the prosecutor and obtain a grant of immunity from use of the statements in any criminal proceeding. He may be willing to provide the grant of immunity if he would be unable to convict the employee in the criminal case based upon a lack of evidence or the likelihood an interview by law enforcement officers would result in anything other than the employee asserting his Miranda rights. A grant of immunity will result in you either getting the evidence you need to pursue discipline or giving you grounds to dismiss the employee based on a refusal to answer. The prosecutor may be satisfied that the disciplinary penalty would be as much or more punishment than what he could obtain through a costly and risky criminal prosecution. You can then give the employee a *Garrity warning* by informing him that nothing he tells you can be used against him in criminal proceedings because he has been provided immunity. You can then ask questions that specifically, directly and narrowly relate to the performance of his official duties on pain of dismissal if he refuses to answer the questions.

   Go forward to interview the employee without in any manner coercing him to waive his right against self-incrimination. Meet with the employee and inform him that you want to ask questions that may help clarify the situation before you make a decision on what disciplinary action to propose and that he can choose to answer or not. Then tell him that if he chooses to not answer, he will not be disciplined for the refusal to answer the questions, but you will be forced to make a decision on how to proceed without any input from him.

   If you do interview the employee, have someone else present to serve as a witness and make sure you and your witness take detailed notes or tape record the interview.

Fingerprints and "rap sheets"

Employers increasingly check applicants for criminal history

By Karen Nelson, Chief
Criminal Justice Information Services Bureau

Detectives and prosecutors aren't the only people asking for fingerprints and rap sheets these days. A growing number of employers, government licensing agencies and security officials are using criminal records for purposes other than criminal justice. This article focuses on ***access methods*** *and* ***available sources*** *of criminal record information. This article does not address the arguably more complex issue of appropriate use of criminal records.*

Access methods

Criminal record information is maintained by criminal justice agencies at all levels of government – local, state and federal. The most ubiquitous criminal record is the criminal history record or rap sheet. The rap sheet presents a summary of arrests and outcomes for a given offender. The rap sheet does not typically include traffic offenses, outstanding warrant information, certain misdemeanors, or violations of local ordinances. Arrests in the criminal history are recorded through the submission of fingerprint impressions of the offender at the time of booking. Consequently, an individual can be positively identified with a criminal history record, and subsequent record searches may be made using either name or fingerprint impression.

Criminal background checks based on fingerprints are considered significantly more accurate than name based checks.

Criminal background checks based on fingerprints are considered significantly more accurate than name based checks. Name based checks are notorious for producing "false positive" and "false negative" responses. False positives occur when two people share the same name. False negatives occur when an individual provides identifiers different than the name indexed in the criminal record system.

The most widely referenced study on the effectiveness of name checks versus fingerprint checks is a 1999 study conducted for a national task force reporting to the U.S. Attorney General. The study subjected 93,274 applicants in Florida to both a name search and fingerprint search by the Federal Bureau of Investigation (FBI). The number of applicants with fingerprint-verified criminal history records was 10,673 (11.4 percent). Of those, 1,252 were indicated by name check not to have a record (false negative). This false-negative group represents 11.7 percent of the applicants with criminal history records, and 1.3 percent of all applicants in the study. The number of applicants without a criminal history record was 82,601. Of those, 4,562 were inaccurately

identified by name checks to have criminal records (false positives). This false-positive group represents 5.5 percent of applicants who did not have criminal records, and 4.9 percent of all applicants.

Available sources

The primary holders of criminal record information are local criminal justice agencies, state central repositories and the FBI. The information below looks at procedures and fees, plus additional public sources of criminal history records.

Local criminal justice agencies

Obtaining criminal record information maintained at the local level requires direct contact with the local law enforcement or court.

State central criminal history repositories

Every state has designated an agency to serve as the state's central criminal history record repository. The state central repository collects, stores and disseminates criminal history records in accordance with state criminal record reporting, access and use laws. The state central repository also functions as a channeling agency for record requests to the FBI. States vary greatly on what information may be disseminated for non-criminal justice purposes, the fees charged for conducting the checks, and whether a fingerprint or name check is acceptable. The Department of Justice serves as the central criminal history repository in the State of Montana. The Department of Justice conducts both fingerprint and name-based checks for authorized purposes. Fees charged range from $5.00 to $8.00.

Federal Bureau of Investigation

The FBI maintains criminal history records for federal offenders and serves as a national central criminal history repository. The FBI conducts fingerprint based background checks for non-criminal justice purposes providing there is an enabling state or federal statute authorizing and requiring such a check. Fees charged by the FBI range from $18.00 to $24.00 depending on the purpose of the request.

Other sources of criminal record information

In addition to local, state and national repositories of criminal history information there are a number of public record sites worth noting. The Montana Department of Justice maintains a public web site of violent and sexual offenders required to register with the local law enforcement agencies under the provisions of the Montana Sexual or Violent Registration Act. The Department of Corrections also maintains a public web site of felony offenders who are or who have been under the supervision of the Montana Department of Corrections. These sites are available through the on-line services menu of the DiscoveringMontana.Com web site or through the following direct links:

Sexual or Violent Offender Web Site:
http://svor2.doj.state.mt.us:8010/index.htm

Department of Corrections Convicted Offender Network:
http://app.discoveringmontana.com/conweb

For additional information concerning access and use of criminal records contact:

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(406) 444-9621 or knelson@state.mt.us

Arbitration roundup

Each arbitration case involves specific bargaining histories, contract language and facts that could be unique to the agency or employer involved. Contact your labor negotiator in the Labor Relations Bureau if you have questions about how similar circumstances might apply to language in your agency's collective bargaining agreement.

Suspension for off-duty criminal conduct?

Arbitrator sustains suspension where employer investigated conduct; overturns suspension where employer merely awaited court outcome.

Lurking behind the headlines of the recent "Hockey Dad" manslaughter trial was a tricky labor question. Could the defendant's employer suspend him from work pending the outcome of his trial for killing his son's hockey coach? The employer indeed suspended him for risk of violence in the work place, but a labor arbitrator overturned the suspension for lack of just cause and awarded back pay. The same arbitrator sustained a different employer's suspension of an employee charged with dealing drugs during off-duty hours. The outcomes in the two cases were different because the arbitrator viewed the facts to be different in one key area. This area was the degree to which each employer investigated the employee's actions and analyzed them with respect to "just cause" and the impact on the business operation.

The case of the "hockey dad"

(U.S. Foodservice v. Int. Brotherhood of Teamsters, 114 LA 1675)

The employer was a large food service distributor with 19,000 employees in 55 locations across the United States. The grievant was a 12-year employee with a satisfactory work record at a distribution hub in Massachusetts. One day while off duty, the grievant attended a junior hockey practice at which his son was a participant. The employer soon learned through public news reports what happened at hockey practice. The grievant objected to another father, who was supervising the skating, that the play was too rough -- especially by the other father's sons. The men engaged in a fight in which the grievant struck the other father, who died from complications related to a cracked skull and internal bleeding. As soon as the grievant was charged, arraigned, and released on bail, the employer suspended him indefinitely pending the outcome of his trial. The employer determined he was unfit to work for the risk he would subject co-workers to violent behavior.

The union grieved the suspension to arbitration. Arbitrator Joseph Chandler overturned the suspension, finding the employer did not properly investigate the employee's actions. The employer never interviewed the employee before suspending him. The employer sought little information about the incident, other than the public reports in the news media. *"The company, by choosing the discipline it has, is permitting the courts, not the contract ('just cause' analysis), to determine the meting out of discipline, both in the public sector of criminal law and in a contract relationship in which the court has no standing,"* Chandler ruled. *"The reliance on the outcome of the court is a questionable excuse for preventative, indeterminate suspension. If the company did not trust the grievant to stem his 'violent nature' in a period of 12 years of employment, what difference would a court decision make, even though the court had already made an interim decision of only a $5,000 bail as indicative of no real public safety concerns?"*

The case of the "alleged drug dealer"

(Group W. Cable, Inc., v. Int. Brotherhood of Electrical Workers, 80 LA 205)

The employer was a television cable service in Florida. The grievant was employed as a cable installer for three years when he was arrested on charges of possessing and dealing cocaine. The grievant was on vacation at the time of his arrest and was released from jail upon posting bond. The employer learned of the arrest by reading the newspaper. The employer learned the employee allegedly traveled to the location of the drug "bust" in a company vehicle, which was impounded by the police. The employer decided to suspend the employee, pending the outcome of his arrest for alleged criminal activities, and met with the employee to hear his side of the story. Before suspending the employee, the company also obtained all available arrest records (and later sought and obtained depositions from the criminal proceedings). The employer's rationale was the company was engaged in a public service and had an image to maintain. It had to protect its customers, and could not have an accused drug dealer entering homes to install cable services where customers might be exposed to more of the alleged misconduct.

The union grieved the suspension to arbitration. Arbitrator Chandler found the employer had just cause to suspend the grievant pending the outcome of the criminal proceedings, so long as the suspension was not "indefinite" and would not exceed one year. He ruled that within one year of the suspension's effective date, the employer must either make the suspension permanent (by termination) or reinstate the grievant. "*In the present instance, the company had a newspaper report and the court records and no defense by the grievant when it took suspension action which was not disciplinary, but one that was to be protective of the Company, its clients and employees pending the outcome of the court proceedings," Chandler ruled. "If the violation is deemed by the company to be of such a nature as to create an immediate company concern for its customers or employees were the employee to continue in active employment during the investigatory period, the immediate non-disciplinary suspension of that employee is well warranted."*

Pertinent case law

Arbitrator Chandler cited the following arbitral precedent *(City of Flint, Michigan, 69 LA 574, 577)*: *"While court proceedings and employer disciplinary action may intertwine, there is an independent responsibility on the part of the employer, despite the pending criminal proceedings or the result of those proceedings, to take action which is appropriate under labor relations practice. In the case of a criminal indictment, definitive and final disciplinary action may not be taken by the employer simply because there was an indictment. A temporary suspension of employment may be justified, but not indefinitely pending determination of guilt or innocence by a court. Absent sound reasons, such a suspension is unfair because it subjects employees unnecessarily to suspense and uncertainty. The pendency of criminal proceedings is not conclusive of the labor relations process; the employer has an independent obligation to act on the basis of the facts available to the employer and consistent with good labor relations practice. Just cause is implied in the assessment of an appropriate penalty on an objective review of the fairness of the penalty. Arbitral law and practice have recognized an implied limitation may be recognized by an arbitrator in respect to the time the employer may take to arrive at an action. The employer may not wait an unreasonable length of time to take final action."*

Questions, comments or suggestions? Contact the Labor Relations Bureau or visit our website: www.discoveringmontana.com/doa/spd/css/

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